No. 02-1528

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CRYSTAL M. FERGUSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court of appeals correctly held that the Respondents, patients seeking prenatal care and delivery treatment at a public hospital, many in emergent situations, did not provide valid consent to searches of their urine for law enforcement purposes simply by consenting to receipt of desperately needed prenatal care and delivery services.

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INTRODUCTION

This case has already been before this Court once. *See Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (*"Ferguson II"*). Now, after the court of appeals faithfully applied the legal standard announced by this Court, Petitioners ask the Court to review the case once again, this time to reevaluate the voluminous factual record so carefully analyzed by the court of appeals. Because there is no legal issue of importance remaining in the case and because Petitioners seek merely to re-litigate the facts of the case, this Court should deny the Petition for *Certiorari* ("the Petition") and move this ten-year-old case one step closer to its conclusion.

In this Court's decision in *Ferguson II* this Court held that staff at the Medical University of South Carolina ("MUSC" or "the hospital") had a "special obligation" to obtain "informed consent" from the Plaintiffs-Respondents ("the patients") for urine drug searches conducted when the patients sought prenatal care and delivery services, and to insure that the patients were "fully informed about their constitutional rights, as standards of knowing waiver require." *Id.* at 85. This Court remanded this case for a determination of whether Petitioners had met their burden of showing that the patients had voluntarily and "knowing[ly] waive[d]" their constitutional rights, *id.* at 84-85, or whether "the searches were conducted without the informed consent of the patients." *Id.* at 75. On remand, the court of appeals faithfully applied that standard and held that the Defendants-Petitioners ("Petitioners") did not meet their burden[1] of establishing that the patients gave "informed consent" to the otherwise unreasonable searches at issue here. *Ferguson v. City of Charleston*, 308 F.3d 380, 404 (4th Cir. 2002) (*Ferguson III*).

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[1] In this case, the Petitioners bear the burden to establish consent. *Ferguson v. City of Charleston*, 308 F.3d 380, 398 (4th Cir. 2002) (*"Ferguson III"*); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 221-222 (1973).

As the panel found by studiously reviewing the volumes of evidence in this case, the only "consent" given by the patients was consent to medical care; the patients were never informed by the hospital that their physicians would perform a search for incriminating evidence, nor was their consent to such a search requested or obtained. To the extent that any were given information by MUSC relating to the search policy, it was only *after* an initial search had been conducted.[2] Instead of informing the patients, Petitioners used the promise of confidentiality in the physician-patient relationship to lure patients into disclosing confidential medical information to medical staff from whom the patients had sought medical assistance.

Petitioners now urge this Court to grant their petition for *certiorari* to adopt the standard of the dissent in *Ferguson II* and to hold instead that the patients' "consent" to medical care was "free and voluntary" consent to a police search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). Not only would such a holding require this Court to ignore the careful review of the evidence by the court below, but also, as the medical *amici* in the court of appeals and in this Court made clear, it would violate fundamental norms of medical ethics, undermining the private doctor-patient relationship and threatening public health. As this Court recognized, an

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[2] The panel found that Pamela Pear was the only patient who was aware of the Search and Arrest policy before she was initially searched by MUSC, *Ferguson III*, 308 F.3d at 401, but she was not informed of the policy by MUSC itself. The panel also found that "a rational jury could infer that Singleton had knowledge of the critical aspects of the Policy" when she was tested the *second* time. *Id.* at 401. However, the panel also found that "a rational jury could not find voluntariness" in the consents given by Singleton and Pear. *Id.* at 404. Singleton was searched the second time immediately after she had given birth in an ambulance; Pear was searched the second time while she was in preterm labor; and all the patients, including Pear and Singleton "had no choice but to seek [prenatal care and delivery] services at MUSC." *Id.* at 403. *See infra* at 15.

intrusion on the "typical patient['s]" reasonable expectation of privacy "may have adverse consequences because it may deter patients from receiving needed medical care." *See Ferguson II*, 532 U.S. at 78 n.14 (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), and Poland, et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 DRUG & ALCOHOL DEPENDENCE 199-203 (1993)); *see also id.* at 84 n.23 ("amici claim a near consensus in the medical community that programs of the sort at issue . . . harm, rather than advance, the cause of prenatal health.").

The court of appeals' opinion adheres faithfully to this Court's mandate on remand, and to well-established Fourth Amendment jurisprudence. Because there is no conflict with the precedent of this Court or of other courts of appeals and because Petitioners' desire ultimately is to reargue the complex facts of this case and revisit this Court's holding in *Ferguson II*, this case does not meet the standard for granting the petition for a writ of *certiorari*. *See* S. Ct. R. 10.

I. STATEMENT OF THE CASE

The patients' case originated with a challenge in the District Court for the District of South Carolina pursuant to 42 U.S.C. § 1983 alleging violations of constitutional, statutory, and common law rights. Currently before this Court is the patients' claim that the searches conducted pursuant to Petitioners' search and arrest policy ("the Policy") were unconstitutional pursuant to the Fourth Amendment. After trial on this issue in the fall of 1996, the district court submitted the question of whether the patients consented to the searches to the jury and the jury found against the patients. The patients then filed a Rule 50(b) motion for judgment after the trial, which the district court denied on August 13, 1997.

On appeal to the United States Court of Appeals for the Fourth Circuit, the patients argued, *inter alia*, that the district court erred in submitting the issue of consent to the jury and that the jury finding of consent could not be supported by the evidence. The court of appeals specifically declined to reach the consent issue, *see Ferguson v. City of Charleston*, 186 F.3d 469, 476 (4th Cir. 1999), *rev'd*, 532 U.S. 67 (2001) ("*Ferguson I*"), instead holding that Petitioners did not need either a warrant or consent in order to conduct the searches because the searches fell within the Fourth Amendment's "special needs" exception. *Id.* at 476-77. This Court reversed and remanded for a determination of whether the Petitioners had met their burden of showing that Plaintiffs had voluntarily and "knowing[ly] waive[d]" their constitutional rights, *Ferguson II*, 532 U.S. at 84-85, or whether "the searches were conducted without the informed consent of the patients." *Id.* at 75.

The court of appeals held that "no rational jury could conclude, from the evidence presented at trial, that [the patients] gave their informed consent to the taking and testing of their urine for evidence of criminal activity for law enforcement purposes." *Ferguson III*, 308 F.3d at 386. The Petitioners' petition for rehearing *en banc* was denied by the full court, voting 9-3.[3] Cert App. 59-60.[4]

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[3] Excluded from the court's holding was Appellant Ellen Knight who, the court held, suffered no Fourth Amendment violation because the search was conducted on her newborn. *Ferguson* III, 308 F.3d at 395. The court also remanded for a determination as to whether Appellant Darlene Nicholson was searched pursuant to the Policy or after it had been discontinued. *Id.* at 396.

[4] Citations to Cert. App. refer to the Appendix to Petition for *Certiorari* filed by petitioners. Transcript excerpts and exhibits may be found in the appendices on file with this Court – the Appendix submitted with the Petition for *Certiorari* filed in 1999 [Cert. App. I]; the Appendix submitted with the Brief in Opposition to that Petition for *Certiorari* [Opp. Cert.

II. COUNTER-STATEMENT OF FACTS

A. The Search and Arrest Policy Was Designed Primarily to Gather Incriminating Evidence from the Patients.

In rejecting Petitioners' argument that the special needs exception excused the warrantless searches at issue here, this Court found that the "primary purpose" of Petitioners' search policy was to "use the threat of arrest and prosecution in order to force women into treatment," and that the "immediate objective of the searches was to generate evidence for law enforcement purposes." *Ferguson II*, 532 U.S. at 83, 84. Thus, the Court held that the "stark and unique fact that characterizes this case" is that Petitioners' search policy "was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions." *Id.* at 86.[5]

B. Knowledge that Urine was Being Searched for Law Enforcement Purposes.

As the court of appeals held, there is no evidence in the record to show that, at the time they submitted to urine testing, the patients who sought medical services from the Medical University of South Carolina ("the patients"), were

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App. I]; and the Joint Appendix submitted in connection with briefing the merits [JA].

[5] The defendants once again seek to portray their policy as one primarily about treatment rather than the search for evidence of criminal conduct and claim without citation that "each of the women completed substance abuse treatment and the charges were dismissed." Cert. Pet. at 2. Unfortunately, such an outcome was not possible for the women who were arrested without any offer of treatment. *Ferguson III*, 308 F.3d at 388 n.5. Moreover, charges against some plaintiffs were only dropped in response to motions to dismiss filed in criminal court with no reference made to the completion of substance abuse treatment.

informed by the Petitioners either that their urine was being searched to gather incriminating evidence or that the hospital's explicit promise of confidentiality did not apply to them.[6] Many of the patients specifically testified that they did not know that their urine would be searched to gather evidence to be used against them. *See* Griffin Tr. 27 (JA 567-68); Singleton Tr. 71 (JA 1145-46); Knight Tr. 139 (JA 783); Powell Tr. 149, 151-52 (JA 1011-12, 1013-14); P. Williams Tr. 238 (JA 1226). In fact, Petitioners even deceived one patient into providing her urine by telling her that they needed to test her for dehydration. As Ms. Nicholson testified:

> [T]hey said I was dehydrated and I needed to be hooked up to glucose . . . . [T]hey told me to drink lots of water. . . . I asked them if I was to be hooked up to the glucose machine. . . .[T]hey just told me to keep drinking water . . . . and told me to use the bathroom in a cup . . . . And I asked what for and they said to see if I had enough fluid in my system so they could send me home.

Nicholson Tr. 278:8-24, 280:6-16 (JA 899-900). Nurse Brown, who was heavily involved in the day-to-day operation of the policy at MUSC, admitted at trial that she did not have permission from the patients to release their medical information to the police or to the Solicitor's Office. Brown Tr. 62:4-8, 16-20 (JA 125, 126).[7] Joe Good, MUSC's Gen-

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[6] MUSC's Patient Handbook, stating that "medical records and all communication pertaining to your care are also treated as confidential," *see* PX 105 (Cert. App. I 75), was shown to all patients who came to MUSC. Brown Tr. 11/21/96 at 20:16-21:3; 27:10-14 (JA 91-92; 94).

[7] "Q: . . . did you have any authorization, any permission signed by any patient, that authorized you to release that information to the Solicitor?

A: No, I didn't." Brown Tr. 62:4-8 (JA 125).

eral Counsel, also expressed concern that the general medical consent forms signed by some of the patients were insufficient to give the hospital consent for the searches conducted here. Good Tr. 202:6-9 (JA 513).

Petitioners have relied on four pieces of documentary evidence to argue that the patients had knowledge of the law enforcement purposes of the searches: the hospital's general consent to medical treatment forms, the "To Our Patients" letter, the Solicitor's letters, and a public service announcement (PSA) that aired after the Policy was instituted. None of these documents establish knowledge.

First, the general medical consent forms, (*see* JX 12, 13 (Opp. Cert. App. I 60-65)), did not state that MUSC was searching patients for drugs to gather evidence for police and prosecutors. *Ferguson III*, 308 F.3d at 398-99 (forms did not "advise[] or even suggest[] to Appellants that their urine might be searched for evidence of criminal activity for law enforcement purposes. Rather . . . Appellants were led to believe that [drug] tests would be conducted only if an Appellant's treating physician deemed such a test advisable in the particular circumstances of that Appellants' medical care."). Accordingly, the District Court correctly instructed the jury that these consent forms were "not sufficient consent to warrant a search where the search information is furnished to law enforcement officers." Jury Charge at 21 (JA 1318-19) (patients "had no reason from reading the consent to know that the information would be shared by the medical people with the law enforcement people"); *see also* Good Tr. 202:6-9 (JA 513); PX 28 (Cert. App. I 72) (Letter from MUSC General Counsel Joe Good to Pat Hudson, Senior Assistant Attorney General (Dec. 19, 1989)) (noting that he

would prefer to change the policy to require "an informed consent for drug screen").[8]

Second, the "To Our Patients" letter warning patients of the dangers of prenatal drug use, which came into use in the hospital's high risk clinic sometime in January 1990, *Ferguson III*, 308 F.3d at 388 n.6, not only failed to disclose that urine drug screens were being conducted for law enforcement purposes but actually "negates any such reading" because it informed readers that law enforcement authorities would become involved only after continued drug-use problems. *Id.* at 401; *see* JX 10 (JA 1269-70) (describing policy as one of "providing warning, counseling and treatment for pregnant women using illegal drugs" and stating that MUSC will "take action" and "ask for help" if patients continue to use drugs or fail to comply with treatment).[9]

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[8] Further, three of patients, Paula Hale, Lori Griffin, and Sandra Powell, signed the forms only *before* the Policy began. *See* DX 173 (Griffin) (showing that only consent form signed by Plaintiff Griffin was signed *before* Policy began) (contained in the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit, hereafter the 4th Cir. JA.) (4th Cir. JA 2109); DX 174 (4th Cir. JA 2154) (Hale) (same); DX 179 (4th Cir. JA 2431) (Powell) (same). One patient, Laverne Singleton, signed a consent form only *after* the search that led to her arrest. *See* DX 180 (4th Cir. JA 2465) (Singleton) (showing that only dated consent form signed by Plaintiff Singleton was signed one year after her arrest). Even if these forms *had* informed the patients about the investigatory purposes of the searches, which they did not, none of these four patients could be said to have consented based on these forms.

[9] As the court of appeals noted, although Nurse Brown testified that all obstetrical patients in the MUSC clinic were given the "To Our Patients" letter before being searched, the only patient whose medical records establish she actually was shown the letter at all, Pamela Pear, was shown the letter *after* she was searched. *Ferguson III*, 308 F.3d at 391 n.9. *See* PX 280 (4th Cir. JA 1729) (noting that Plaintiff Pear was "given letter from the Dept. of [ob/gyn]" after testing positive); *see also* JX 10 (JA 1269-70) ("To Our Patients" letter stating if "we *continue* to detect evidence of drug abuse") (emphasis added). Because the court found that

Similarly, as the court of appeals noted, the Solicitor's letter, which was given to some patients *after* they tested positive,[10] informed those patients that they would be required to attend substance abuse and prenatal appointments; the letter neither requested consent to anything nor informed the patients that their physicians were conducting medical tests to discover incriminating evidence and were turning that evidence over to the police. *See Ferguson III*, 308 F.3d at 402 ("letter does not inform the reader that the urine drug screen which prompted the letter had been a search conducted in conjunction with law enforcement personnel"). Nor did the letter inform the patients that "any subsequent urine drug screen would be done for law enforcement purposes. Rather, the only reference to the involvement of law enforcement personnel concerns the consequences of a patients' failure to attend substance abuse counseling or prenatal care appointments." *Id.*; *see* JX 7 (JA 1265). Likewise, the PSA "simply informed viewers that cocaine was harmful to fetuses and that MUSC would provide help to pregnant women who used cocaine." *Ferguson III*, 308 F.3d at 401; *see also id.* at 388 (quoting PSA as stating, *inter alia*, "[I]f you have a problem with drugs talk to your doctor . . ."). As the court below noted, "[n]othing in the PSA provided any notice that the 'help' provided by MUSC involved

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the letter did not inform the patients of the law enforcement purpose of the search, this conflict in the evidence was immaterial to the court's decision. *Ferguson III*, 308 F.3d at 391 n.9.

[10] The Solicitor's letter states "[d]uring your recent examination you tested positive for drugs." JX 7 (JA 1265); *see also* Newman Tr. 280:1-7 (JA 886). Moreover, patients Griffin, Powell, Knight and Singleton were never shown the Solicitor's Letter, probably because it was not yet in use when they were searched. PX 14 (JA 1285) (Letter from Francis J. Cornely, Asst. Solicitor to Nurse Brown indicating that letter not available as of October 24, 1989).

searches of patients' urine for evidence of criminal activity for law enforcement purposes." *Id.*[11]

The court of appeals did find that a rational jury could have concluded, based on her testimony at trial, that Pamela Pear, unlike the other plaintiffs, had knowledge of the law enforcement purposes of the first urine drug screen she underwent. *Id.* at 401 (quoting testimony that Pear was aware that MUSC had a policy of testing pregnant women for illegal drugs and that "'there was a policy regarding arresting pregnant women [who] used illegal drugs during ... pregnancy.'"). The court also found that, although there was no evidence from which a rational jury could infer Laverne Singleton's knowledge of the law enforcement aspects of the Policy when she was searched for the first time in connection with the birth of her child in November 1989, a rational jury could have concluded based on Singleton's arrest after that first search that she did have knowledge of the law enforcement aspects of the Policy when she was searched again in November 1990, after she delivered a baby in an ambulance en route to MUSC. *Id.* at 400-01.

C. The Searches Were Conducted While the Patients Were Under Duress.

All of the patients were indigent, insured by Medicaid and dependent on the medical care provided by MUSC, the only public hospital in the city and the one facility to which all high-risk patients were referred. *Id.* at 403. Moreover, many of the patients were searched when they sought emergency medical care, either in the process of, or immediately

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[11] The public service announcement was only created by the Solicitor's Office and aired on local television stations sometime after March 1990. Condon Tr. 27:19-24 (JA 360). Only two patients, Ferguson and Joseph, reported seeing it, and neither knew that their medical providers were working with the police. Ms. Ferguson testified that she thought she would be *helped* if she went to the hospital, not *arrested*. Ferguson Tr. 201, 207:6-19 (JA 477-78, 481); Joseph Tr. at 124-25 (JA 753-55).

after delivery (including in two cases by emergency Cesarean section), when presenting to the hospital in pre-term labor, or in excruciating pain caused by another medical condition. *See Id.* at 390-93; *see also* PX 281 (4th Cir. JA 1842-44, 1852-53) (Powell); PX 275 (4th Cir. JA 1559-61, 1563, 1571) (Griffin); PX 278 (4th Cir. JA 1698-99, 1705, 1707) (Knight); Singleton Tr. at 53 (JA 1133); PX 282 (4th Cir. JA 1859-60, 1865, 1873-75, 1880) (Singleton); PX 276 (4th Cir. JA 1581-83, 1585) (Hale); PX 274 (4th Cir. JA 1532-33) (Ferguson); PX 283 (4th Cir. JA 1910-11, 1949) (P. Williams); PX 280 (4th Cir. JA 1757, 1770, 1817) (Pear); *Ferguson II*, 308 F.3d at 392 (Joseph admitted to hospital in severe pain for treatment of an infection in her right foot). As is particularly relevant here, Laverne Singleton was searched for the second time after she delivered a baby in an ambulance en route to the hospital, and Pamela Pear was in preterm labor the second time she was searched. Moreover, Pamela Pear was completely dependent on MUSC for prenatal care the first time she was searched in August 1990. *Id.* at 404.

III. REASONS FOR DENYING THE WRIT

Petitioners have failed to raise any issues that warrant this Court's granting the petition for *certiorari*. Following the Court's previous decision in this case, the court of appeals meticulously applied the legal standard announced by the Court. In doing so, the court of appeals sifted through thousands of pages of evidence to reach a separate conclusion as to each of the ten plaintiffs. The court held that eight of the ten women had not consented to the drug tests, one woman had not been searched, and the status of one woman's search needed to be determined on remand to the district court. Petitioners are now asking this Court to re-weigh the evidence in the case and to revisit the legal issue already decided in *Ferguson II*. Neither of those reasons warrants this Court's returning its focus to this case.

A. This Court Should Not Review the Court of Appeals' Fact-Bound Determination That There Was Insufficient Evidence From Which a Rational Jury Could Conclude that Any of the Patients Provided a Valid Consent to the Taking and Testing of Her Urine for Law Enforcement Purposes.

Faithfully applying the standard outlined by this Court for determination of the issue of consent in the "particular" circumstances of this case, the court of appeals held:

> [N]o rational jury could conclude, from the evidence presented at trial, that Appellants gave their informed consent to the taking and testing of their urine for evidence of criminal activity for law enforcement purposes.

308 F.3d at 386. The court's holding encompasses two determinations. First, the court held that "as to most of the Appellants, the record evidence does not support a finding that Appellants knew that their urine was being analyzed for evidence of criminal activity for law enforcement purposes." *Id.* Second, the court held that, given the record evidence establishing the significant medical distress and need experienced by the patients at the time they were searched, a rational jury could not have found that the patients "for Fourth Amendment purposes, voluntarily submitted to the searches." *Id.*

1. The Evidence Shows that the Patients Lacked Any Knowledge that Their Urine Was Being Analyzed for Evidence of Criminal Activity for Law Enforcement Purposes.

As carefully outlined in the panel opinion, there is simply no evidence that Petitioners fulfilled their "special obliga-

tion" to inform each patient that she was the target of a criminal investigation each time she was searched.[12] None of the evidence could possibly have been found by a reasonable jury to establish that any of the patients, other than Pamela Pear and Singleton, were aware that their urine would be searched for incriminating evidence by their physicians. First, uncontroverted testimonial evidence from the patients themselves indicated that they did not know that the hospital was searching their urine for criminal investigatory purposes. *See* Griffin Tr. 27 (JA 567-68); Singleton Tr. 71 (JA 1145-46); Knight Tr. 139 (JA 783); Powell Tr. 149, 151-52 (JA 1011, 1014); P. Williams Tr. 238 (JA 1226); Nicholson Tr. 278, 280 (JA 899-900, 901-02). Second, the documentary evidence relied upon by Petitioners at trial to show consent – the Solicitor's letters, the "To Our Patients" letter, the public service announcement, and the general consent to medical treatment form – did not inform the patients of the true nature of the searches. Moreover, none of the documents other than the general consent form sought consent for anything. Third, some of the patients did not ever see the documents, or simply signed general hospital consent forms long before the policy was instituted in the fall of 1989 and hence before they could have known of the law enforcement purpose[13] or saw them after the search.[14] *See supra* at 8. Constitutionally sufficient consent requires the consent to be given *before* the

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[12] As the court noted, separate consideration of the circumstances of each search of each individual plaintiff is required. *Ferguson III*, 308 F.3d at 398 n.15.

[13] Paula Hale, Lori Griffin, and Sandra Powell signed general consent for medical treatment forms before any documents related to the policy were created or distributed. *See supra* at 8.

[14] Laverne Singleton signed a consent for medical treatment form after she was searched. To the extent any of the patients saw the Solicitor's letter or the "To the Patients" letter, it was after the searches had been performed. *See supra* at 8; *Ferguson III*, 308 F.3d 388 n.6.

search; notice after the fact, even if it had been given here which it was not, could never suffice.

2. No Evidence Shows that the Patients Would Have Been Searched Absent the Search and Arrest Policy.

Petitioners once again argue that the patients were tested for medical, not law enforcement, purposes. Pet. at 15-17. But this Court already found that the "primary purpose" of Petitioners' search policy was to "use the threat of arrest and prosecution in order to force women into treatment," and that the "immediate objective of the searches was to generate evidence for law enforcement purposes." *Ferguson II*, 532 U.S. at 83-84. This Court held that the "stark and unique fact that characterizes this case" is that Petitioners' search policy "was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions." *Id.* at 86.

Petitioners argue that the panel erred in finding that "there was *no* evidence introduced into this record to support the conclusion that any of the searches here would have been conducted in the absence of the Policy." *Ferguson III*, 308 F.3d 398. But the only evidence cited by Petitioners to the contrary was testimony that it is generally desirable for a woman's physician to know if she is using drugs, and the fact that the giving of a urine sample is a normal part of a medical examination. Pet. at 15-16. While pregnant women often give their doctors urine samples, *drug testing* is anything but routine; it is the exception, as this targeted Policy demonstrated. There is simply no evidence that the plaintiffs themselves would have been tested in the absence of the policy.

3. The Patients Who Consented to Medical Drug Tests Were Under Extreme Duress that Vitiated Consent.

The court of appeals also held that "the conduct of Singleton and Pear particularly, and the remaining Appellants generally, in presenting themselves to MUSC for treatment cannot be considered 'voluntary' in a constitutional sense." *See Ferguson III*, 308 F.3d at 402-404.

Petitioners argue without support that the court of appeals exceeded the scope of review by evaluating whether the patients' "vulnerable subjective state" had an impact on their ability to provide informed consent. Pet. at 24-25. However, it is well-established that where consent to a search is procured through duress or coercion, it is invalid. *See Bumper v. North Carolina*, 391 U.S. 543, 550 (1968); *see also Schneckloth*, 412 U.S. at 229 ("In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."). Many federal statutes and regulations governing patient consent to emergency care recognize that in an emergency medical context, like the situations in which the patients allegedly "consented" to medical treatment, a patient is presumed to refuse consent to something that may not be in their best interest.[15] For instance, physicians may not obtain consent for sterilization from a woman who is in labor. *See* 42 C.F.R. § 50.204(e). Similarly, under the Emergency Medical Treatment and Active Labor Act (EMTALA), patients are presumed to refuse consent to transfer to other hospitals when a transfer would be against the best interests of their health, even if a patient

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[15] Even in non-emergency situations, the South Carolina Supreme Court has recognized that a patient's disclosures to her physician for the purpose of diagnosis and treatment "are not totally voluntary." *McCormick v. England*, 494 S.E.2d 431, 435 (S.C. 1997).

signs a waiver permitting transfer. *See, e.g., Malave Sastre v. Hosp. Doctor's Ctr., Inc.* 93 F. Supp. 2d 105 (D.P.R. 2000) (construing 42 U.S.C. § 1395dd). Thus, the panel's consideration of the patients' "possibly vulnerable subjective state" was not only appropriate, but required by Supreme Court precedent. *See Schneckloth*, 412 U.S. at 229 ("account *must* be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.") (emphasis added).

Moreover, contrary to Petitioners' contention, Pet. at 25, consideration by the court of appeals of the patients' vulnerable subjective state was wholly appropriate in this case in which the trial court instructed that the jury evaluate voluntariness, Tr. Jury Charge at 20 (JA 1317-18) (specifically delineating only "some" of the factors to be considered"); *see also* Tr. of Further Charge to Jury at 16 (4th Cir. JA 2607). Nor can it seriously be questioned by anyone who has experienced the pain, stress and anxiety of labor and delivery either personally, through a loved one, or even by watching depictions of the process on television, that that particular form of medical distress creates "a vulnerable subjective state that is inimical to voluntary consent." *See Ferguson III*, 308 F.3d at 403. No further evidence of such distress, other than the simple medical facts presented here, were necessary to establish this undeniable truth. *Cf.* Pet. at 26 (referring to court of appeals finding as "based on pure speculation").

B. *Certiorari* Is Not Appropriate Here Because the Court of Appeals Faithfully Applied this Court's Announced Standard for Remand.

Petitioners argue that by giving their urine to their physicians in the course of medical treatment, the patients provided valid consent to the search of their urine for law enforcement purposes. Pet. at 20. First, adopting the theory advocated by Justice Scalia in dissent in *Ferguson II*, Petitioners argue that the panel "misidentified the 'Fourth

Amendment event' at issue as the taking and testing of the urine for law enforcement purposes." Pet. at 8. Instead, they argue, once the urine was handed over to the physicians the Fourth Amendment inquiry should be over. *Id.* However, as the panel recognized, not only did this Court in *Ferguson II* "implicitly reject[]" this position, *Ferguson III*, 308 F.3d at 395 n.11, but also this Court "has uniformly addressed the constitutionality of the taking of a urine sample *and the testing of that sample for evidence of drug use.*" *Id.* at 395 (emphasis in original) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989)).

Second, in arguing that the panel "created an unprecedented, heightened standard of *informed consent*," Pet. at 5, the Petitioners ignore both that this Court announced the standard to be applied here on remand and that that standard is fully consistent with preexisting Fourth Amendment jurisprudence on consent. This Court remanded this case for a determination of whether Petitioners had met their burden of showing that the patients had voluntarily and "knowing[ly] waive[d]" their constitutional rights, *Ferguson II*, 532 U.S. at 84-85, or whether "the searches were conducted without the *informed consent* of the patients." *Id.* at 75 (emphasis added). As the court of appeals recognized:

> [T]he remand by the Supreme Court in *Ferguson II*, requiring us to determine whether Appellants gave their *informed* consent to the searches, rests upon the particular factual circumstances of this case. Simply put, the circumstances of the encounter between Appellants and those conducting the searches were unusual. In the vast majority of cases, consent to search is requested by one known to the suspect to be a law enforcement officer. Here, in contrast, any request for con-

> sent was made by medical personnel acting (unknown to Appellants) as agents of law enforcement.
>
> In remanding for further consideration of the consent issue, the Supreme Court set specific parameters tailored to these unique circumstances, as indicated by its decision to use the term "informed consent," language that does not appear in the Court's other consent-to-search cases. Under these parameters, Appellants' knowledge of law enforcement involvement in the Policy is critical to the existence of informed consent.

308 F.3d 380, 397. As this Court admonished:

> "when [state hospital employees] undertake to obtain [] evidence [of criminal conduct] from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights." [*Ferguson II*, 532 U.S.] at 85, (citing *Miranda v. Arizona*, 384 U.S. 436, (1966) by comparison).

Id.; see also id. (citing *Ferguson II*, 532 U.S. at 78 (noting that in special needs cases involving urine drug screens, "there was no misunderstanding about the purpose of the test") and *Ferguson II*, 532 U.S. at 78 n.13 (stating that nothing in mandatory reporting laws "would . . . lead a patient to anticipate that hospital staff would intentionally set out to obtain incriminating evidence . . . for law enforcement purposes")).

This Court's standard reflects the fact that when a patient gives medical information to a physician, she maintains a reasonable expectation that that information will remain confidential:

> [t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.

Id. at 78.[16] Any disclosure by the patient to medical personnel is conditioned on the express and implied[17] promise of confidentiality in the physician-patient relationship. This Court's opinion thus recognized that only a fully informed consent could overcome a patient's reasonable assumption that a physician would be acting in the patient's best interest, rather than seeking "to generate evidence for law enforcement purposes." *See Ferguson II*, 532 U.S. at 85.[18]

The requirement of "informed consent" in these unique circumstances was an essential part of this Court's decision in *Ferguson II*. This Court held that the "direct and primary purpose" of the policy was to "generate evidence *for law enforcement purposes.*" *Id.* at 83-84 (emphasis in original).

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[16] "[T]he invasion of privacy in this case is far more substantial than in [the previous special needs cases]" because in none of those previous cases, "was there any intrusion upon that kind of expectation," or any "misunderstanding about the purpose of the test." *Id.*

[17] *See* Hippocratic Oath (quoted in ALBERT R. JONSEN et al., CLINICAL ETHICS 166 (4th ed. 1998)); *McCormick v. England*, 494 S.E.2d 431, 435 (S.C. 1997) (because disclosures for purposes of medical treatment are "not totally voluntary," in exchange "it is expected that the physician will keep such information confidential.").

[18] Moreover, the notion of a "knowing waiver" is completely consistent with the requirements of informed consent in the medical setting. *See Brief of Amici Curiae South Carolina Med. Ass'n, et al., Ferguson III*, 308 F.3d 380 (2002) No. 97-2512.

When doctors act like the police, actively pursuing incriminating evidence, they must comply with the warrant and probable cause requirements of the Fourth Amendment or obtain a "knowing" consent to a search. *Id.* at 84-85. As this Court pointed out, the fact that MUSC was pursuing evidence for the police did not "merely provide a basis for distinguishing" the special needs cases. It also "provides an affirmative reason for enforcing the strictures of the Fourth Amendment." *Id.* at 84. This Court's concern was that doctors who are acting as police agents should not be allowed to evade the Fourth Amendment's warrant and probable cause requirements. What makes this case unique is that without a requirement that patients be fully informed, doctors (and the police through doctors) would always be able to evade the Fourth Amendment because patients ordinarily disclose information or surrender bodily fluids in reliance on their reasonable expectation of privacy in the physician-patient relationship. *Id.* at 77-78 & n.13. If it were legally permissible for the doctors to search their patients for incriminating evidence *without* ensuring that their patients were fully informed, the Court's decision that the special needs exception did not apply in this case, and that therefore consent was required, would have had no practical effect. Thus, the requirement of fully informed consent is a crucial part of the Court's reasoning and set clear parameters for the court of appeals on remand.[19]

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[19] Petitioners argue that this Court did not announce the standard to apply on remand. *See* Pet. at 13. Petitioners base their argument on a footnote in *Ferguson II* that stated that the Court was not resolving the legal and factual issues regarding consent. *Ferguson II*, 532 U.S. at 77 n.11. Announcing the standard for the court of appeals to use on remand, as the court clearly did in this case, is not inconsistent with leaving the legal and factual issues open on remand. For example, the Court in *Ferguson II* did not consider whether the patients provided informed consent or whether the evidence was legally insufficient to uphold the jury's verdict. Nor did the Court consider the plaintiffs' arguments concerning

Petitioners' characterization of the court of appeals' application of this Court's standard for remand as having created a "new, heightened standard for consent searches," Pet. at 11, not only misconstrues the Supreme Court's case law on scope of consent, it also ignores the limitations on the application of the informed consent standard both implicit and explicit in this Court's opinion and the court of appeals' opinion. First, this Court has previously held that a search is invalid if it reaches beyond the scope of the consent that the individual provides. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *id.* at 252 ("suspect may of course delimit as he chooses the scope of the search to which he consents."). This Court has therefore explained that a hotel guest who provides "implied or express permission" to "maids, janitors or repairmen to enter his room in the performance of their duties" does not also permit such individuals to bring the police with them. *Stoner v. California*, 376 U.S. 483, 489 (1964) (citing *United States v. Jeffers*, 342 U.S. 48 51 (1951)). Analogously, as the court of appeals recognized below, by permitting their physicians to provide them with medical care, the patients did not consent to a search of their urine for law enforcement purposes. *See Ferguson III*, 308 F.3d at 399 (citing *Stoner*, 376 U.S. at 489-90); *see also Jimeno*, 500 U.S. at 251; *cf. Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) ("Test results may not be used in a criminal prosecution of the employee without the employee's consent."). Ruling otherwise would leave the Fourth Amendment rights of patients to the "unfettered discretion" of doctors, *see Stoner*, 376 U.S. at 490 (holding that to find the search at issue to be reasonable would leave Fourth Amendment rights of hotel guests "to depend upon the unfettered discretion" of hotel employees); *see also*

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the coerciveness inherent in the conditions under which the searches were performed. These were the questions properly considered by the court of appeals.

Chapman v. United States, 365 U.S. 610, 616-17, with disastrous consequences for the provision of health care.

The holding of *Schneckloth*, 412 U.S. at 248-49, cited by Petitioners, *see* Pet. at 9, that knowledge *of a right to refuse* consent is not a prerequisite of a voluntary consent,[20] is inapposite. In that case, uniformed police sought consent to a search; it was clear that the person searched was aware what they were consenting to. It did not involve the *scope* of a consent to a search, a lack of knowledge that a search was being conducted, or a physician-patient relationship where the reasonable expectation of privacy remains despite disclosures.[21]

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[20] The Supreme Court *did* acknowledge that knowledge of a right to refuse consent is one of the many factors that can be considered in determining "voluntariness." *Schneckloth*, 412 U.S. at 234. There is no evidence that the patients in this case had any knowledge of their right to refuse consent, further supporting the patients' position that they did not provide a voluntary and knowing consent.

[21] The court of appeals also noted that the *Ferguson II* opinion's citation to *Miranda's* "knowing waiver" standard could be read to suggest that the Petitioners should also be required to demonstrate that the patients were aware of their constitutional *right to refuse* to consent, 308 F.3d at 397 n. 14, a holding that would be "in some tension with *Schneckloth*." *Id.* The court specifically declined to decide whether this Court truly intended to impose this additional burden, or whether the Court cited to *Miranda* as further support for and explanation of the "informed consent" standard itself. *Id.* Indeed, the plaintiffs have never relied on the patients' lack of knowledge of their *right to refuse* consent as anything more than one factor to be considered in the "totality of circumstances" test as *Schneckloth* provides. *Schneckloth*, 412 U.S. at 227. Rather, the patients have simply argued that consent to medical care, with the accompanying reasonable expectation of privacy attendant in the private relationship between a patient and her doctor, could not be considered "voluntary" consent to a search for incriminating evidence. Because the court below did not apply a "knowledge of a right to refuse consent" standard, the Petitioners' argument that this Court should take *certiorari* to resolve this non-issue is a red herring.

Nor are this Court's cases discussing disclosure of information to informants implicated here. *See* Pet. at 10. In those cases, this Court held that a person who communicated information about criminal conduct to a supposed friend assume the risk that it would be disclosed to the government and, therefore, had no legitimate expectation of privacy in the information. *See Hoffa v. United States*, 385 U.S. 293, 301-02 (1966) ("*no interest legitimately protected by the Fourth Amendment is involved.*") (emphasis added); *Lewis v. United States*, 385 U.S. 206, 211 (1966) ("business [in home] is entitled to no greater sanctity than if it were carried on in a store . . ."). Moreover, none of the searches went beyond the explicit limitations placed on the scope of consent. *See Lewis*, 385 U.S. at 209-10 (in discussing *Gouled*, highlighting the importance of remaining within the scope of consent); *Hoffa*, 385 U.S. at 303; *On Lee v. United States*, 343 U.S. 747 (1952); *see also United States v. Miller*, 425 U.S. 435 (1976); *Securities & Exchange Comm'n v. O'Brien*, 467 U.S. 735 (1984). Where consent is obtained "by stealth, or through social acquaintance, or in the guise of a business call," as it was here, the search must be limited to the scope of the consent; otherwise, it is no longer consensual but is "against [the] will" of the person searched. *Gouled v. United States*, 255 U.S. 298, 305-06 (1921) (search beyond scope of consent when man obtained entry into a suspect's home by falsely representing that he intended only to pay a social visit, then searched private papers); *id.* at 304-05.[22]

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[22] *See also United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990) ("entry ... acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation" or when the government agent "misrepresent[s] the scope, nature or purpose" of his or her investigation violates Fourth Amendment) (internal citations omitted); *United States v. Attson*, 900 F.2d 1427, 1429 (9th Cir. 1990) (defendant "did *not* consent to the taking of blood *for police use*," but only for "medical purposes").

Finally, the Petitioners' claim that the requirement of informed consent in the "particular" circumstances of this case somehow calls into question statutes mandating reporting of suspected child abuse or domestic violence is misguided at best. This Court repeatedly distinguished the facts at issue in this case, where hospital personnel and law enforcement used the patients' heightened expectation of confidentiality in the medical relationship and specifically targeted patients for searches for incriminating evidence, from a situation where medical personnel inadvertently uncover evidence of a crime in the course of medical treatment and then turn this evidence over to the police because of obligations under state law. *See Ferguson II*, 532 U.S. at 78 n.13, 80-81.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the petition for a writ of *certiorari*.

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